

STATE OF MICHIGAN
IN THE SUPREME COURT

In re REQUEST FOR ADVISORY OPINION
REGARDING CONSTITUTIONALITY OF
2005 PA 71

SC: 130589

BRIEF *AMICI CURIAE* OF FRANK J. KELLEY,
ATTORNEY GENERAL EMERITUS

ORAL ARGUMENT REQUESTED

KELLEY CAWTHORNE, PLLC
101 S. WASHINGTON SQUARE, 9TH FLOOR
LANSING, MICHIGAN 48933
(517) 371-1400

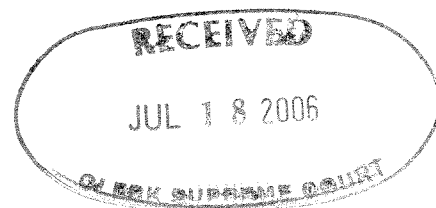


TABLE OF CONTENTS

	PAGE NO.
INDEX OF AUTHORITIES.....	ii
STATEMENT OF QUESTION PRESENTED.....	iii
STATEMENT OF FACTS AND BACKGROUND.....	1
ARGUMENT.....	3
CONCLUSION.....	6

INDEX OF AUTHORITIES

PAGE NO.

Federal Cases:

<i>Bay County Democratic Party v Land</i> , 347 F Supp 2d 404 (ED Mich 2004).....	3
<i>Common Cause v Billups</i> , 406 F Supp 2d 1326 (ND GA 2005).....	4
<i>Common Cause v Billups</i> , (ND GA Case No. 4:05-CV-00201-HLM, July 12, 2006).....	5
<i>Dunn v Blumstein</i> , 405 US 330; 92 SCt 995; 31 L Ed 2d 274 (1972).....	3
<i>Westberry v Sanders</i> , 376 US 1; 84 SCt 526; 11 L Ed 2d 481 (1964).....	3

State Cases:

<i>Perdue, et al. v Lake et al.</i> (Superior Court Fulton County, Case No. 2006CV119207, July 7, 2006).....	5
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Statutes:

MCL 168.1.....	1
MCL 168 § 523(1).....	1
2005 PA 71.....	2

Other Authorities:

1997 OAG 6930 (January 29, 1997).....	1
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STATEMENT OF QUESTION PRESENTED

- I. **DO THE PHOTO IDENTIFICATION REQUIREMENTS OF SECTION 523 OF 2005 PA 71, MCL 168.523, ON THEIR FACE, VIOLATE EITHER THE MICHIGAN CONSTITUTION OR THE UNITED STATES CONSTITUTION?**

Amicus Curiae Frank J. Kelley's Answer: Yes.

STATEMENT OF FACTS AND BACKGROUND

In 1997 as Attorney General, I issued an opinion in response to a question posed by a member of the Legislature regarding the constitutionality of a 1996 amendment, 1996 PA 583; to Michigan Election Law, MCL 168.1 et seq. 1997 OAG 6930 (January 29, 1997). (Please see the attached copy marked Exhibit 1). Specifically, the question involved an amendment to section 523(1) of the Election Law which requires either the production of a picture identification card or the execution of an affidavit that the elector does not possess such a card before being allowed to vote. The question asked whether such a requirement violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I concluded and opined that the amendatory language to Michigan's Election Law with its requirement of imposing upon an elector the production of photo identification prior to exercising his/her fundamental right to vote, or in the alternative, requiring the elector to execute an affidavit stating they did not have such a photo identification prior to exercising their fundamental right, did indeed violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. I stand by my opinion and given the subsequent court interpretations of statutes involving the same subject matter from Georgia, my opinion issued nearly a decade ago has subsequently been ratified.

The pertinent language in section 523(1) of the Michigan Election Law provides:

(1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan vehicle

code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act.

On April 26, 2006 this Court granted a request from the Michigan Legislature for an advisory opinion on the constitutionality of the photo identification requirements contained in 2005 PA 71. As part of that Order the Court invited persons or groups interested in the determination of the question to move the Court for permission to file briefs amicus curiae.

ARGUMENT

As pointed out in my opinion No. 6930 of January 29, 1997 “The United States Supreme Court has consistently recognized that in our democracy the right to vote is our most precious right.” *Westberry v Sanders*, 376 US 1, 17; 84 S Ct 526; 11 L Ed 2d 481 (1964).

As I quoted from *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L. Ed 2d 274 (1972) “*But, as a general matter, ‘before the right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.’*” (Emphasis added) (citations omitted).

While the prevention of voter fraud is a legitimate government objective, factually there has never been any evidence of any substantial in-person voter fraud in Michigan before my opinion, or after my opinion, to this date that would justify placing the restriction of a voter photo I.D. burden into our statutes or infringing on a precious constitutional right. Every Michigan Secretary of State in my memory is on record at various times as saying that Michigan is a clean voting state. Indeed, the integrity of Michigan elections are recognized by the federal court. *Bay County Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich 2004). In that case the Judge noted that, “Michigan enjoys an election history that is relatively fraud-free.” 347 F Supp 2d at 437 (citing my opinion).

Of recent date the Director of Michigan Elections Mr. Christopher Thomas informed me that he had never observed or heard of a single case of a voter using fake identification at the time of voting. Therefore, I must conclude once again, that there is no known reason for invoking the burden of voter photo identification on the electorate.

This Court should note that in 2005 the U.S. District Court for the Northern District of Georgia upheld an injunction barring the State of Georgia from enforcing a new voter photo identification law. *Common Cause v Billups*, 406 F Supp 2d 1326 (ND Ga). Similar to Section 523 of Michigan's Election Law, the Georgia law required Georgia voters to present a government issued photo I.D. as a precondition to having access to vote. Following the same reasoning of my opinion, the 2005 U.S. District Court injunction against the State of Georgia in an opinion written by Judge Harold Murphy likened the Georgia law to a Jim Crow era poll tax that required residents, most of them black, to pay back taxes before voting. Here, the restriction was the requirement of a photo I.D., the cost of which was borne by the voter.

In the initial case, the Georgia Secretary of State pointed out that to her knowledge the state had not had one complaint of in-person fraudulent voting during her tenure.

Subsequent to the 2005 decision of Judge Murphy, the Georgia Legislature passed a more relaxed statute providing for the issuance of a free voter I.D. for electors. Nonetheless, once again both a state and federal court in Georgia struck down voter I.D. requirements as unconstitutional.

In the first Court decision, Judge Melvin Westmoreland of the Fulton County Superior Court stated the requirement placed an undue burden on the fundamental right to vote.

Judge Westmoreland went on to state:

The General Assembly has wide latitude to legislate unless it undertakes to act where the Georgia Constitution enumerates a clear and unmistakable

right to Georgia's citizens ... it is a given that any illegal restriction of the fundamental right to vote is prohibited. *Perdue, et al. v Lake et al.*, (Superior Court Fulton County, Case No. 2006CV119207, July 7, 2006).¹

On July 10, 2006 the State filed an emergency motion with the Georgia Supreme Court in an effort to appeal Judge Westmoreland's decision to temporarily enjoin Georgia from enforcing its photo identification requirement.²

On July 12, 2006 the Georgia Supreme Court denied the state's emergency motion, thus allowing Judge Westmoreland's temporary injunction to stand. *Perdue, et al. v Lake et al.*, (Superior Court Fulton County, Case No. 2006CV119207, July 7, 2006)³

Following the state court ruling, federal Judge Harold Murphy who threw out Georgia's voter photo I.D. law last year once again on July 12 this year, blocked the state from enforcing its revised voter I.D. law for this year's election. Even though photo I.D.s would be supplied to all Georgians free of charge, Judge Murphy said the state's latest attempt at requiring voter photo IDs discriminated against people who don't have driver's licenses, passports or other government IDs. *Common Cause v Billups*, (Case No. 4:05-CV-00201-HLM (July 12, 2006)). Thus, even in those instances where the state provides voter photo identification for free, such a requirement still imposes an unconstitutional burden on a person's fundamental right to vote and creates two classes of voters, one eligible because of the possession of photo ID one not eligible because her/she lacks it..

¹ Available at: http://www.gasupreme.us/high_profile/fulton_order.pdf

² Available at: http://www.gasupreme.us/high_profile/emer_motion.pdf

³ Available at: http://www.gasupreme.us/high_profile/so6m1856ord.pdf

CONCLUSION

I respectfully remind the Honorable Court that Michigan has always enjoyed the deserved reputation of being a socially aware state in the protection of the civil rights of all citizens. The goal of the freedom train during the Civil War period was to try to get their passengers to Michigan. In the aftermath of the Civil War, Michigan was the first state to draft a civil rights statute. I believe that history would judge us harshly if Michigan became one of those states that would attempt to limit a precious constitutional civil right to vote by its citizens.

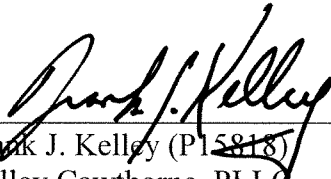
Respectfully submitted,

KELLEY CAWTHORNE, PLLC

Dated: _____

7-18-06

By: _____


Frank J. Kelley (P15818)
Kelley Cawthorne, PLLC
101 S. Washington Sq., 9TH Fl
Lansing, MI 48933
(517) 371-1400